Supreme Court, U.S.
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87-67

No. .....

In The
Supreme Court of the United States
October Term, 1986

ELTON FLOYD JAMES, SUPERINTENDENT,
Petitioner,

v.

JO NELL WISECUP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether this Court's decision in *Francis v. Franklin*, 471 U.S. 307 (1985), requires that a trial court's instructions at the guilt-innocence phase of trial automatically be found to be unconstitutionally burden-shifting due to inclusion of "Franklin language", regardless of the effect of the trial court's instructions when considered as a whole?

2.

Whether when scientific evidence renders a criminal defendant's defense at trial "physically impossible", a *Sandstrom* error may be found to be harmless under the principles set forth in *Rose v. Clark*, — U.S. —, 106 S.Ct. 1301 (1986)?

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—o—

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ELTON FLOYD JAMES, SUPERINTENDENT,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

PETITION FOR WRIT OF CERTIORARI

—o—

The Petitioner, Elton Floyd James, respectfully prays that the writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit entered in this action on May 16, 1987, and April 23, 1987.

The initial opinion of the United States District Court for the Middle District of Georgia granting Respondent federal habeas corpus relief was entered on January 8, 1986. (Appendix A). However, on appeal, the Eleventh Circuit found that the district court had been without jurisdiction over the case when it entered its original order of January 8, 1986. *Wisecup v. James*, 790 F.2d 841 (11th Cir. 1986). (Appendix B). When the case was remanded to the district court, the district court vacated its previous order

granting federal habeas corpus relief but essentially reaffirmed the granting of habeas corpus relief to Respondent by granting Respondent's motion for relief from judgment. (Appendix C).

On March 16, 1987, in an unpublished opinion, the Eleventh Circuit entered an order affirming the granting of federal habeas corpus relief to Respondent. (Appendix D). Petitioner's petition for rehearing was denied by the Eleventh Circuit on April 23, 1987. (Appendix E).

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JURISDICTIONAL STATEMENT

The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit was entered on March 16, 1987. Petitioner's petition for rehearing was denied by the circuit court on April 23, 1987. A stay of the mandate was granted until July 6, 1987.

This petition for a writ of certiorari has been timely filed within the allowable ninety days. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Section I, Fourteenth Amendment:

> Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof

are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. § 16-5-2:

A person commits the offense of voluntary manslaughter when he causes the death of another human being under circumstances which would otherwise be murder and if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; however, if there should have been an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and be punished as murder.

———o———

STATEMENT OF THE CASE

Respondent, Jo Nell Wisecup, was tried in the Superior Court of Houston County, Georgia, for the offense of murder. However, following a jury trial, Respondent was found guilty of the lesser included offense of voluntary manslaughter on February 29, 1980. On April 10, 1980, Respondent received a twelve year sentence, with eight years to be served in prison and the remaining four years to be served on probation.

Respondent appealed her conviction and sentence to the Court of Appeals of Georgia, which court affirmed the conviction and sentence in *Wisecup v. State*, 157 Ga. App.

853, 278 S.E.2d 682 (1981). Respondent's petition for rehearing was denied by the Court of Appeals of Georgia on March 11, 1981. Respondent's petition for a writ of certiorari to the Supreme Court of Georgia was denied on April 10, 1981.

Next, Respondent filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia. On October 21, 1985, the district court accepted the proposed findings of fact and conclusions of law submitted by the United States Magistrate and denied Respondent federal habeas corpus relief. (Appendix A).

Respondent timely appealed the denial of relief to the Eleventh Circuit. While the case was on appeal, the district court held that the decision of this Court in *Francis v. Franklin*, 471 U.S. 307 (1985), required the district court to vacate its first order denying federal habeas corpus relief to Respondent. Therefore, the district court entered a subsequent order in which it granted federal habeas corpus relief to Respondent. (Appendix B). Petitioner then filed a notice of appeal as to this second order of the district court granting relief.

On appeal, the Eleventh Circuit found that because a notice of appeal had been timely filed, the district court lacked jurisdiction to enter its second order of January 8, 1986, granting relief. *Wisecup v. James*, 790 F.2d 841 (11th Cir. 1986).

On remand from the Eleventh Circuit, on June 27, 1986, the district court vacated its second order of January 8, 1986. However, the district court granted Respondent's motion for relief from judgment for the reasons previously

stated in its order of January 8, 1986. This order had the effect of granting Respondent federal habeas corpus relief. (Appendix C). A notice of appeal was then filed by Petitioner in the Eleventh Circuit from the granting of federal habeas corpus relief to Respondent.

Following briefing and oral argument, the Eleventh Circuit, on March 16, 1987, affirmed the judgment of the district court granting federal habeas corpus relief. (Appendix D). Petitioner's petition for rehearing was denied on April 23, 1987. (Appendix E).

Petitioner seeks review of the March 16, 1987, decision of the Eleventh Circuit affirming the granting of federal habeas corpus relief, (Appendix D), in which decision the Court adopted the original order of the district court granting Respondent federal habeas corpus relief based on an alleged *Sandstrom* error and also finding that the instruction in the context of this case was not harmless error. (Appendix A). The trial court's instructions at issue are Appendix F to this brief.

———o———

REASONS FOR GRANTING THE WRIT

I. The Inclusion of Language in a Trial Court's Instruction Which is the Same as or Similar to the Language Contained in Franklin v. Francis, — U.S. —, 105 S.Ct. 1965 (1985), Does Not Automatically Require a Finding that a Trial Court's Charge is Unconstitutionally Burden-Shifting.

(i)

The district court granted federal habeas corpus relief to Respondent, finding that the trial court's following

instructions to the jury were unconstitutionally burden-shifting:

> The acts of a person of sound mind and discretion are presumed to be the product of that person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. These presumptions may be rebutted by any evidence to the contrary.

(Trial Transcript, p. 351).

In making its decision the district court's analysis consisted solely of the erroneous observation that the instructions given in this case were "virtually identical" to the instructions reviewed by this Court in *Francis v. Franklin,* 471 U.S. 307 (1985). (Appendix A). The Eleventh Circuit affirmed the granting of federal habeas corpus relief to Respondent on the basis of the district court's opinion. (Appendix D).

Contrary to the district court's characterization of the trial court's charge, that portion of the instructions alleged to be unconstitutional is clearly different from the portion of the charge found to be unconstitutional by this Court in *Francis v. Franklin, supra.* In this case the jury was specifically told that this presumption, and the other charged presumptions, were subject to being rebutted "by any evidence to the contrary." (Trial Transcript, p. 351).

In *Francis v. Franklin, supra,* this Court held that an analysis of whether a particular charge is unconstitutionally burden-shifting, " 'requires careful attention to the words actually spoken to the jury . . ., for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could

have interpreted the instruction' ''. *Francis v. Franklin, supra, citing Sandstrom v. Montana,* 442 U.S. 510, 514 (1979). Additionally, as noted by this Court in *Francis v. Franklin, supra,* at 354, "other instructions might explain the particular alleged infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. (Cites omitted)."

The Eleventh Circuit, in its capacity as a federal habeas corpus court reviewing state court judgments, is deviating from the clear mandate of this Court which requires reviewing courts to examine the trial court's instructions as a whole in determining whether the instructions are unconstitutionally burden-shifting. *See Cupp v. Naughten,* 414 U.S. 141 (1973). Instead, the circuit court is simply concluding that if language which has been successfully challenged in other cases is present in the case under review, the charge is automatically determined to be burden-shifting, regardless of the content of the trial court's instructions when reviewed as a whole.

Petitioner submits that the mere identification of *Franklin* language in a trial court's instruction does not end the analysis which must be performed by a reviewing court. This simplistic approach by the circuit court to the analyzation of a state trial court's instructions requires the granting of this petition for a writ of certiorari.

(ii)

If the charge as a whole were examined in this case, as required by *Cupp v. Naughten,* 414 U.S. 141 (1973), constitutionally significant distinctions between this charge

and the charge given in *Sandstrom* and *Francis* become apparent. As an initial matter, unlike the trial court's instructions in *Franklin*, this jury was specifically told in this case not only that the subject presumptions could be rebutted, but was further instructed by what quantum of proof these presumptions might be rebutted, i.e., by any evidence to the contrary. (Trial Transcript, p. 351).

More importantly, Petitioner submits that reviewing all of the instructions contained in the trial court's charge, a reasonable juror could not have understood the challenged language as shifting any burden of persuasion to Respondent. *Francis v. Franklin, supra,* at 323. The charge of the trial court began with important general instructions to the jury concerning the defendant's presumption of innocence and the burden of proof upon the state. The jury was clearly and unequivocally told that, "the burden of proof in this case rests upon the state *from the beginning to the end* of the trial to establish beyond a reasonable doubt every fact essential to the conviction of the defendant." (Emphasis supplied). (T. 346-347).

The trial court went further and gave specific instructions informing the jury that, "criminal intent is a necessary element of a crime and the state must prove such intent." (T. 350). Immediately following the admonition to the jury that criminal intent is a necessary element of a crime, the jury was told that in this case the defendant had pled accident as a defense and the trial court specifically informed the jury as to how the state's burden to prove intent and the defendant's defense of accident interfaced. The court clearly told the jury, "no person shall be found guilty of any crime which is committed by mis-

fortune or accident where it satisfactorily appears there was no criminal intention." (Emphasis supplied).

Petitioner submits that a reasonable juror would have connected these two portions of the charge and would therefore have understood that the state had the burden of proving intent and if there was no intent, the defendant could not be found guilty of the crime, especially where as in this case, she pled that the homicide resulted from an accident. An accident was defined as, "an event which takes place without one's foresight or expectation, that which happens without design." (T. 350).

It was only after the jury had been told that the burden of proof rested on the state to prove every essential element of the crime from "beginning to end" of the trial, that intent was one of these elements and after the jury had been told that if a crime is committed by accident, there is in fact no criminal intention, was the so called "*Franklin* language" given in the trial court's charge to the jury. (T. 351).

The trial court's instructions clearly informed the jury about the nature of homicide offenses under Georgia law by stating as follows:

> Homicide means the death of a human being. It may be either criminal or justifiable or accidental. The State contends that the death of Danny Wisecup was criminal and that it was murder, the highest grade of criminal homicide.
>
> Under the facts of this case you are permitted to consider three grades of homicide which I will take up in order of their gravity. (T. 351).

The trial court defined murder as follows:

> A person commits murder when she unlawfully and with malice aforethought, either express or implied causes the death of another human being.

(T. 351). Express and implied malice were defined for the jury and the jury was told specifically that, "malice is an essential element of murder, and it must exist before any homicide can be murder." (T. 352).

However, in this case, the jury did not find Respondent guilty of the offense of murder, but rather found her guilty of the lesser offense of voluntary manslaughter. The crime of which Respondent was convicted was defined as follows:

> A lesser degree of homicide is voluntary manslaughter. A person commits voluntary manslaughter when she causes the death of another human being under circumstances which would otherwise be murder, if she acts solely as the result of a sudden, violent and irresistible passion resulting from serious provocation which is sufficient to excite such passion in a reasonable person. However, if there be an interval between the provocation and the killing which is enough for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and be considered murder rather than voluntary manslaughter. Whether such an interval existed is a question for you to decide.

(T. 352).

The trial court specifically delineated between the offenses of murder, with which Respondent was charged, and voluntary manslaughter, of which Respondent was convicted by stating, "the difference between murder and vol-

untary manslaughter is that in murder there must be malice and in manslaughter there must be no malice." (T. 353). The trial court discussed provocation and motive and told the jury that "in all cases the motive is for the determination of the jury." (T. 353). The trial court also charged on involuntary manslaughter and "felonious or aggravated assault."

Not only did the trial court discuss the defense of accident, but the trial court informed the jury as to how to review evidence that the Respondent had acted in self-defense. Self-defense was explained as follows:

> Where a person dies because the defendant was acting in reasonable defense of herself, then the homicide is justifiable. Self-defense is a law of necessity. Every person has the right to defend herself against death or serious bodily injury.
>
> A person is justified in threatening or using force against another when and to the extent that she reasonably believes that such threat or force is necessary to defend herself against such other's imminent use of unlawful force. However, a person is justified in using force which is intended or likely to cause death or great bodily harm only if she reasonably believes that such force is necessary to prevent death or great bodily harm to herself, or to prevent the commission of a forcible felony.

(T. 354-355).

By contrast, the jury was told under what circumstances a person would not be justified in using force, by giving the following charge:

> A person would not be justified in using such force as I have just described if she provokes an attack against herself as an excuse to inflict bodily harm

> upon the other person, or if she were the aggressor in the first instance.
>
> In deciding whether the theory of justification is applicable to the otherwise unlawful act, the fundamental question is whether the act was done only as a measure of prevention against an impending or progressing wrong or whether it was motivated by revenge or other illegal purpose originating with the defendant

(T. 355).

Finally, having been given all the relevant legal principles for the jury to utilize in reaching its verdict, the trial court further assisted the jury in its deliberation by fully explaining the possible verdicts that the jury could return. First, the trial judge informed the jury that, "if you find beyond a reasonable doubt that the defendant committed the offense of murder as charged, then you would convict her, and the form of your verdict would be 'we find the defendant guilty as charged,' or, 'we find her guilty of murder.' (T. 355-356).

However, the jury was told, "if you decide she is not guilty of murder or entertain a reasonable doubt as to her guilt of that offense, you would consider whether she was guilty of the offense of voluntary manslaughter." (T. 356).

The court then told the jury that if they did not find the defendant guilty of voluntary manslaughter or entertained a reasonable doubt as to her guilt then they could consider whether she was guilty of the offense of voluntary manslaughter. (T. 356).

Petitioner contends that the trial court's instructions viewed as a whole clearly focused the jury's attention on

to the crucial question to be resolved, i.e., whether the homicide in question was intentional or was the result of accident or self-defense on the part of the Respondent. The trial judge clearly and properly instructed the jury in accordance with Georgia law as to how to resolve this issue, bearing in mind the burden of proof on the state, the defendant's presumption of innocence, the fact that accident is a non-intentional crime and that a homicide committed in self-defense is a justifiable fact and results in acquittal to the defendant. Simply stated, viewed in context, the intent charge did not render the instructions unconstitutionally burden-shifting in light of the clear-cut instructions to the jury as to the legal issues to be resolved in Respondent's case, including whether Respondent had acted justifiably or the death of Respondent's husband was the result of an accident.

Therefore, this case is clearly illustrative of the abandonment by the circuit court of the *Cupp v. Naughten* rule requiring review of the trial court's charge as a whole and instead evidences a reliance by the circuit court on a predetermined "rule" requiring a finding that a trial court's instruction to the jury is unconstitutionally burden-shifting merely because it contains so-called *Franklin* language.

II. Where Scientific Evidence Renders a Defendant's Defense "Wholly Implausible" the Harmless Error Rule of Rose v. Clark, — U.S. —, 106 S.Ct. 3101 (1986), Would Prevent the Granting of Federal Habeas Corpus Relief Based on an Allegedly Burden-Shifting Instruction.

In this case, the Eleventh Circuit Court of Appeals left intact the finding of the district court that, "although there is certainly sufficient evidence of an attempt to sus-

tain a conviction of guilty, the evidence is not overwhelming . . .'' (Appendix A). However, the district court did not have the benefit of this Court's decision in *Rose v. Clark,* — U.S. —, 106 S.Ct. 3101 (1986), but instead relied on the harmless error rule as contained in prior Eleventh Circuit decisions. Petitioner submits that a proper application of the principles of *Rose v. Clark, supra,* to the facts of this case would have prevented the granting of federal habeas corpus relief. Further, Petitioner submits that in cases such as this, where a defense is both frivolous and a physical impossibility, the harmless error rule should be applied so as to prevent the granting of federal habeas corpus relief.

The harmless error analysis of the circuit court would allow application of the harmless error rule only if intent is ''conceded'', in clear contravention of the principles of *Rose v. Clark, supra.* This approach was rejected in *Rose v. Clark, supra,* where the Court defined the essential question to be resolved as ''whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it necessary to rely on the presumption.'' *Rose v. Clark, supra* at 3190. Again, the circuit court refuses to apply this analysis if a criminal defendant in any way contests his or her guilt and therefore, renders the rule a nullity.

This ''strained'' interpretation of *Rose v. Clark* which ignores the proper application of the harmless error rule is amply demonstrated in this case. Despite the fact that Respondent's defense was frivolous and her version of the shooting was contradicted in every respect by scientific testimony, the circuit court still refused to apply the harmless error rule. Respondent claimed that she accidentally

shot and killed her husband during a "heated" argument and struggle in their home. Respondent claimed that her husband's hand was on the revolver and that at the time it fired, the revolver was less than six inches from the victim's stomach.

The state's experts clearly showed these claims to be untrue. The ballistics expert testified that the pistol was fired from a distance of no less than two to five feet from the victim's entry wound. There was also no evidence of powder residue on the hands or clothing of the victim as would have been present if the victim had been holding the pistol at the time it was fired, as claimed by the Respondent.

Most tellingly, the angle in which the bullet traveled through the body excluded the possibility that a right handed person, such as the victim, could have fired the weapon, thereby injuring himself. The ballistics experts established that the victim's hands were not within six inches of the muzzle or cylinder of the pistol and concluded, based on this fact and the foregoing pieces of evidence, that the probability was "very high" that Respondent's contention that the victim fired the weapon thereby shooting himself was clearly wrong.

Scientific evidence also undermined Respondent's version of the events in other respects. Specifically, Respondent's version of the homicide was that the pistol went off during a struggle with her husband, but ballistics experts testified that if there had been such a struggle the path of the bullet through the body of the victim would have been "at an angle" rather than the straight path through the victim's body that was present in this case. Similarly, no

other indication of the struggle claimed to have existed by Respondent was supported by the experts who testified that there were no hand injuries to the victim, which injuries most often appear when a struggle has in fact taken place.

There being no eyewitnesses to the crime except for the Respondent, the state can only establish intent and the other requisite elements of the crimes of murder or voluntary manslaughter via circumstantial evidence. Petitioner contends that in this case the state clearly met its burden of proof of establishing that Respondent had acted intentionally in taking the life of her husband and the presentation of evidence by the state also acted so as to totally negate either an accident defense or a defense of self-defense by Respondent. Construing all of the evidence as a whole, the state's evidence rendered Respondent's asserted defense frivolous and more than that, totally impossible under the laws of nature and physics. Therefore, this case provides the appropriate setting for applying the harmless error rule of *Rose v. Clark.*

The failure of the circuit court to apply the harmless error rule in such circumstances as presented in this case clearly warrants the granting of a petition for a writ of certiorari because to refuse to apply the harmless error rule in such cases prevents there being any application of the harmless error rule in a circumstantial evidence case or even a case in which there is simply no eyewitness to the crime. Petitioner submits that the harmless error rule of *Rose v. Clark* was not meant for such a narrow interpretation but rather should be applied to prevent the granting of a new trial when the state has, as in this case, clearly proven the Respondent's guilt.

———o———

CONCLUSION

For all of the above and foregoing reasons, Petitioner submits that this Court should grant a writ of certiorari in order to prohibit the mechanistic application of *Francis v. Franklin* to trial court's instructions and further to insure the proper application of *Rose v. Clark, supra,* to situations such as those in which a criminal defendant's defense is physically impossible and frivolous and the guilt of the defendant is clearly proven.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

JO NELL WISECUP, Petitioner,	)	
vs.	)	CIVIL ACTION 81-164-MAC
ELTON FLOYD JAMES, Respondent.	)	

Order

(Filed October 21, 1985)

The magistrate filed proposed findings and recommendations with the court to which written objections were filed. Pursuant to Rule 8(b), the undersigned judge, having made a *de novo* determination of the objected to proposed findings, does hereby accept the proposed findings and recommendations in their entirety.

Petitioner's application for a writ of habeas corpus is therefore DENIED.

SO ORDERED, this 21st day of October, 1985.

/s/ Wilbur D. Owens, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

JO NELL WISECUP, Petitioner,	)	
vs.	)	CIVIL ACTION NO. 81-164-MAC
ELTON FLOYD JAMES, Respondent.	)	

Judgment

(Filed Oct. 21, 1985)

Pursuant to the order of this court dated and filed on the 21st day of October, 1985, petitioner's application for a writ of habeas corpus is denied.

This 21st day of October, 1985.

Gregory J. Leonard, Clerk

By: /s/ Mary B. Rowe
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

JO NELL WISECUP, Petitioner,	)	
vs.	)	CIVIL ACTION 81-164-MAC
ELTON FLOYD JAMES, Supt., Respondent.	)	

Order

(Filed Jan. 8, 1986)

On October 21, 1985, this court denied Jo Nell Wisecup's petition for a writ of habeas corpus. The court's order accepted the findings of fact and conclusions of law proposed by the magistrate to whom the petition was referred. On November 19, 1985, petitioner filed a notice of appeal and a motion for certificate of probable cause to appeal.

Under Rule 222(b) of the Federal Rules of Appellate Procedure, the motion for a certificate of probable cause was addressed to the district court. The motion cited the case of *Francis v. Franklin*, 471 U.S. —, 85 L.Ed.2d 344 (1985). *Franklin* had not been decided at the time the magistrate submitted his proposed findings in this case. As explained below, the *Franklin* decision requires this court to vacate its order denying the petition for a writ of habeas corpus and requires that the court grant the petition.

Petitioner challenges her 1980 conviction in the Superior Court of Houston County, Georgia. She was found

guilty of voluntary manslaughter in the shooting death of her husband. Petitioner raises two grounds for relief in her petition: (1) insufficient evidence under *Jackson v. Virginia,* 443 U.S. 307, 61 L.E.2d 560 (1979), and (2) erroneous burden-shifting jury instructions on the issue of intent.

Jury Charge Error

Petitioner contends that the magistrate's conclusion that the jury instructions did not violate her Due Process rights is incorrect under *Francis v. Franklin,* 471 U.S. —, 85 L.Ed.2d 344 (1985). *See also Brooks v. Kemp,* 762 F.2d 1383 (11th Cir. 1985) (en banc); *Drake v. Kemp,* 762 F. 2d 1449 (11th Cir. 1985) (en banc); *Tucker v. Kemp,* 762 F.2d 1496 (11th Cir. 1985) (en banc); *McClesky v. Kemp,* 753 F.2d 877 (11th Cir. 1985) (en banc); *Davis v. Kemp,* 752 F.2d 1515 (11th Cir.) (en banc), *cert. denied,* 53 U.S.L.W. 3851 (U.S. 1985). The jury instruction found unconstitutional in *Franklin* is as follows:

> The acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted.

Franklin, 471 U.S. at —, 85 L.E.2d at 354. In the present case, the trial judge instructed the jury that:

> The acts of a person of sound mind and discretion are presumed to be the product of that person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. These presumptions may be rebutted by any evidence to the contrary.

Trial transcript at 351. The jury charges in *Franklin* and in the present case are virtually identical. Therefore,

there is no question that the instructions in the present case are also impermissibly burden-shifting.

If the charge read as a whole explains or cures the error in the case, the charge as a whole is constitutional. *Id.* at —, 85 L.E.2d at 356. The magistrate concluded that the statement in the charge that the presumption could be rebutted "by any evidence to the contrary" saved the instruction. However, subsequent to the magistrate's order, the Supreme Court held that this additional phrase is ***not*** sufficient to cure the error in the charge. *Id.* at —, 85 L.E.2d at 355. The magistrate further concluded that other parts of the instruction made it clear that the burden of proof was upon the state. In particular, the magistrate pointed to the language in the charge that "[n]o person will be presumed to act with criminal intention." The Supreme Court also rejected that argument in *Franklin*. *Id.* at —, L.E.2d at 356-360.

The final issue before the court is whether giving the incorrect jury charge was harmless error. The Supreme Court has expressly stated that it has not resolved whether an improper jury charge that shifts the burden to the defendant can ever be harmless. *Franklin*, 471 U.S. at —, 85 L.E.2d at 360. In the Eleventh Circuit, this kind of error can be harmless in two situations: *first*, when intent is not at issue at the trial; or *second*, when evidence of intent is overwhelming. *See Miller v. Norvell*, 775 F.2d 1572, 1576 (11th Cir. 1985).

The element of intent was without question an issue at the trial in the present case. Georgia law provides:

> A person commits the offense of voluntary manslaughter when he causes the death of another human

> being under circumstances which would otherwise be murder and if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; however, if there should have been an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and be punished as murder.

O.C.G.A. § 16-5-2(a) (1984) (formerly Ga. Code Ann. § 26-1102). Under that statute, the elements of voluntary manslaughter are: "(1) an intentional killing, which was (2) unlawful and (3) prompted solely by a sudden, violent, and irresistable passion resulting from serious provocation sufficient to excite such passion in a reasonable person." *Woods v. Linahan*, 648 F.2d 973, 977 (5th Cir. 1981) (Unit B). Intent was therefore an element which the state had the burden of proving beyond a reasonable doubt.[1]

Petitioner contended at trial that her husband was shot accidentally. The respondent does not dispute that intent was thus an issue at trial. Memorandum in Support of Respondent's Answer and Motion to Dismiss filed September 28, 1981, at 14 ("During trial, as her defense, she related that the shooting was accidental and occurred while she was attempting to defend herself during a scuffle with the victim. . . . Petitioner has consistently maintained that she did not intend to kill her husband.")

As stated earlier, even though intent was an issue at trial, the error is considered harmless if the evidence of

---

[1] The trial court also instructed the jury on the offense of murder. Trial transcript at 351-52.

intent is "overwhelming." *Miller*, 775 F.2d at 1576. This court has reviewed the transcript as well as all the other documents on file with the court. Although there is certainly sufficient evidence of intent to sustain a conviction of guilty, the evidence is not overwhelming. Evidence introduced at trial shows that petitioner and her husband had argued on numerous occasions and that her husband wanted a divorce. In addition, there was evidence that petitioner's husband used drugs and that money for his drug habit was the cause of many of their arguments. This evidence, in addition to other evidence in the record, supports petitioner's contention that her husband had the gun and that it fired accidentally while petitioner and her husband were fighting. This court cannot conclude that the evidence of intent was overwhelming so as to make the jury instruction harmless error.

CONCLUSION

The court's order dated October 21, 1985, is hereby VACATED. The court accepts and adopts the magistrate's proposed findings of fact and conclusions of law as to the insufficient evidence claim. *See* Rule (8)(b)(4), 28 U.S.C.A. fol. § 2254 (West 1977). However, the court rejects the magistrate's conclusion as to the jury charge issue. The petition for a writ of habeas corpus is therefore GRANTED as to the jury charge issue.

It is further ORDERED that petitioner's conviction be reversed and that within ninety days after this judgment becomes final, either by failure of respondent to appeal or by affirmance of this case on appeal, petitioner be reindicted and tried, failing which petitioner shall be released from custody.

The clerk is directed to forward this opinion to the United States Court of Appeals for the Eleventh Circuit.

SO ORDERED, this 8th day of January, 1986.

/s/ Wilbur D. Owens, Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

JO NELL WISECUP, Petitioner,	)	
V.	)	CIVIL ACTION NO. 81-164-MAC
ELTON FLOYD JAMES, Superintendent, Respondent.	)	

ORDER

(Filed June 27, 1986)

On October 21, 1985, the court accepted the proposed findings and recommendations of the magistrate and denied petitioner's application for a writ of habeas corpus. The petitioner then filed a notice of appeal and a motion for a certificate of probable cause to appeal. The motion cited the case of *Francis v. Franklin,* 471 U.S. —, 85 L.E.2d 344 (1985), which had not been decided at the time the magistrate submitted his proposed findings. In an order dated January 8, 1986, the court held that the *Franklin* decision required the court to vacate its order denying the petition for a writ of habeas corpus and required the court to grant the petition. The respondent appealed that order.

On appeal, the Eleventh Circuit ruled that because a notice of appeal had been filed this court lacked jurisdiction to enter the January 8 order. *Wisecup v. James,* 790

F.2d 841, 842 (11th Cir. 1986). The Eleventh Circuit held further that:

> Thus, we must remand to the district court with instructions to vacate the January 8 order for want of jurisdiction. Wisecup can thereafter file a Rule 60(b) motion in the district court requesting it to vacate the October 21 judgment and grant her habeas petition. The resulting order could then be appealed.

Id. (citation omitted). The petitioner has subsequently filed a motion for relief from judgment under Rule 60.

Pursuant to the Eleventh Circuit's order, the January 8, 1986, order is hereby VACATED. Petitioner's motion for relief from judgment is hereby GRANTED for the reasons set forth in the January 8 order.

SO ORDERED, this 27th day of June, 1986.

WILBUR D. OWENS, JR.
United States Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

JO NELL WISECUP, Petitioner,	)	
vs.	)	CIVIL ACTION NO. 81-164-MAC
ELTON FLOYD JAMES, Superintendent, Respondent.	)	

JUDGMENT

(Filed June 27, 1986)

Pursuant to the order of this court dated and filed on the 27th day of June, 1986, and pursuant to the Eleventh Circuit's Order the order of January 8, 1986 is hereby vacated. Petitioner's motion for relief from judgment is hereby granted for the reasons set forth in the January 8 order.

This 27th day of June, 1986.

GREGORY J. LEONARD, CLERK
/s/ Mary B. Rowe, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

JO NELL WISECUP, Superintendent, Respondent Petitioner,	)	
vs.	)	CIVIL ACTION NO. 81-164-MAC
ELTON FLOYD JAMES, Respondent.	)	

ORDER

(Filed July 9, 1986)

For the reasons set forth in the court's order of January 8, 1986, the petition for a writ of habeas corpus is GRANTED.

SO ORDERED, this 9th day of July, 1986.

/s/ Wilbur D. Owens, Jr.
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-8525

JO NELL WISECUP,

Petitioner-Appellee,

versus

ELTON FLOYD JAMES, Supt.,

Respondent-Appellant.

———o———

Appeal from the United States District Court
for the Middle District of Georgia

———o———

(March 16, 1987)

Before VANCE and KRAVITCH, Circuit Judges, and BROWN*, Senior Circuit Judge.

PER CURIAM:

Affirmed on the basis of the well reasoned opinion of the Honorable Wilbur D. Owens, Jr. expressed in the district court's order of January 8, 1986. *See also Rose v. Clark*, — U.S. —, 106 S. Ct. 3101 (1986).

AFFIRMED.

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* Honorable John R. Brown, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

April 23, 1987

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case and Names Of Parties

TO ALL PARTIES LISTED BELOW:

No. 36-8525

JO NELL WISECUP v. ELTON FLOYD JAMES
(No. CIV81-164-MAC)

The enclosed order has this day been entered on petition ( ) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure and Eleventh Circuit Rule 27 for issuance and stay of mandate.

Sincerely,

MIGUEL J. CORTEZ Clerk
By: /s/ Paul Holloway
Deputy Clerk

Encl.

Susan V. Boleyn, AAG
Robert Altman

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-8525

JO NELL WISECUP,

Petitioner-Appellee,

versus

ELTON FLOYD JAMES, Supt.,

Respondent-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

(Filed April 23, 1987)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion March 16, 11 Cir., 1987, — F.2d —).

(April 23, 1987)

Before VANCE and KRAVITCH, Circuit Judges, and BROWN*, Senior Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.
ENTERED FOR THE COURT:

/s/ (illegible)
United States Circuit Judge

APPENDIX F

THE STATE OF GEORGIA	)	MURDER
	)	Special Presentment No. 11648
vs.	)	Jury Trial: Feb. 27-29, 1980
JO NELL WISECUP	)	CHARGE OF THE COURT

Ladies and gentlemen, as you know, you have been empaneled to try the case of The State against Jo Nell Wisecup who is charged with murder as set out in an indictment which was returned by the grand jury of this county on December 20, 1979.

To this indictment she has entered her plea of not guilty, and thereby she challenges and denies each and every allegation in the indictment. The indictment and her plea will be out with you when you consider the case. They are not evidence, and you should not consider them as such. They represent the legal manner in which the case was brought into court for trial.

In spite of her indictment, the defendant is presumed to be innocent until her guilt is established by the evidence to the exclusion of and beyond every reasonable doubt.

The burden of proof in this case rests upon the State from the beginning to the end of the trial to establish beyond a reasonable doubt every fact essential to the conviction of the defendant.

The law does not require, and the defendant is not called upon, to prove that she is innocent of the accusa-

tions made against her, as her innocence is conclusively presumed until the contrary is established beyond a reasonable doubt. The State, however, is not required to prove the guilt of the defendant beyond all doubt. Moral and reasonable certainty is all that can be expected in a legal investigation.

A reasonable doubt is defined as a doubt which is based on the evidence, on a lack of evidence or on a conflict in the evidence. It is a doubt which is reasonably entertained as opposed to a vague or fanciful doubt.

If after you consider all the facts and circumstances in the case your minds are wavering, unsettled and unsatisfied, then that is the doubt of the law and you should acquit the defendant. On the other hand, if such doubt does not exist as to her guilt, you should convict her.

You are the sole judges of the credibility of the witnesses and of the weight to be given their testimony. In deciding the credit to be given any witness' testimony you may take into account his or her ability and opportunity to observe the facts; his or her memory; the witness' manner while testifying; any interest, bias or prejudice the witness may have, and you may consider the reasonableness of such testimony.

If there are conflicts in the evidence it is your duty under the law to reconcile them whenever possible so as to make all witnesses speak the truth, and not attribute a false statement to any of them. If you cannot do this, however, then you would believe the testimony that is most reasonable and credible to you.

To impeach a witness means to attack the credibility of that witness. A witness may be impeached by disproving

the facts testified to by him or her, by proof of contradictory statements previously made by him or her on matters relevant to his or her testimony, or by proof of his or her general bad character.

If you decide that a witness has been impeached, it would be for you to decide what weight that witness' testimony should be given.

Ordinarily the court received testimony of witnesses only as to facts in which they have particular and direct knowledge. In certain cases, however, where a particular degree of knowledge is required to understand the situation, the law receives the opinion of those deemed to be expert in those lines.

The opinion testimony of an expert can be based on hypothetical questions or based upon observations of the expert. You should not consider any opinion at all unless the facts upon which it is based are found by you to be true.

Even though you are permitted to receive the testimony of experts, you are not bound by such testimony. The law allows you to receive it and consider it along with all the other evidence in the case.

It is from the evidence submitted to you that you should make your decision. Evidence may be either direct or circumstantial. Direct evidence is that which itself speaks to the issue involved. Indirect or circumstantial evidence is that which by its consistency suggests or implies that a certain claim or theory is true.

Before you would be authorized to convict on evidence which is wholly circumstantial, such evidence must not only prove the guilt of the defendant beyond all reasonable

doubt but it must also exclude every other reasonable theory except that of guilt. In other words, if the circumstances are subject to equally reasonable constructions, one indicating guilt and the other innocence, you are obligated to accept that construction indicating innocence.

An admission or incriminatory statement as applied to a criminal case is a statement made by the defendant which does not amount to a full confession of guilt but tends to prove the offense, or which, along with other proven circumstances, implies guilt, or which tends to disprove some defense claimed by the accused.

If you find that the defendant made certain statements which amount to admissions you would apply these instructions: To make an admission or incriminatory statement admissible, it must have been freely and voluntarily made without being induced by another by the slightest hope of benefit or the remotest fear of injury. In addition, if you find that the admission was made during the course of an in-custody interrogation, then in order for it to be admissible it must be shown that the accused was advised of her constitutional rights. The defendant must have been advised under those circumstances that she had a right to remain silent; that anything she might say would be used against her in court; that she had a right to have an attorney present during the interrogation, that if she could not afford a lawyer, the court would appoint one to represent her, and you must find that she understood and waived those rights in order for you to decide that any statement she made was voluntary.

All admissions should be scanned and received with caution. An admission uncorroborated by other evidence will not support a conviction.

A crime is defined as a violation of a law of this state. Such violation must include the joint operation of act and intention. Criminal intent is a necessary element of a crime and the state must prove such intent.

No person shall be found guilty of any crime which is committed by misfortune or accident where it satisfactorily appears there was no criminal intention.

An accident is an event which takes place without one's foresight or expectation, that which happens without design.

If the death of the victim in this case was the result of an accident not involving any criminal scheme or undertaking on the part of the defendant, you would acquit her.

Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the product of that person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. These presumptions may be rebutted by any evidence to the contrary.

No person will be presumed to act with criminal intention, but you may find such intention or the absence thereof upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is being prosecuted.

Homicide means the death of a human being. It may be either criminal or justifiable or accidental. The State contends that the death of Danny Wisecup was criminal and that it was murder, the highest grade of criminal homicide.

Under the facts of this case you are permitted to consider three grades of homicide which I will take up in order of their gravity.

Murder is defined as follows: A person commits murder when she unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to kill which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

Malice is an essential element of murder, and it must exist before any homicide can be murder. Malice in its legal sense is not necessarily ill will or hatred. It is the unlawful, deliberate pre-conceived intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing. If such intention enters the mind of the slayer a moment before she commits the fatal act, that is sufficient.

A lesser degree of homicide is voluntary manslaughter. A person commits voluntary manslaughter when she causes the death of another human being under circumstances which would otherwise be murder, if she acts solely as a result of a sudden, violent and irresistible passion resulting from serious provocation which is sufficient to excite such passion in a reasonable person. However, if there be an interval between the provocation and the killing which is enough for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and be considered murder rather than voluntary manslaughter. Whether such an interval existed is a question for you to decide.

Manslaughter is the unlawful killing of a human being without malice, either express or implied, without any deliberation at all and which may be voluntary upon a sudden heat of passion.

The difference between murder and voluntary manslaughter is that in murder there must be malice and in manslaughter there must be no malice.

Threats alone are not sufficient provocation to reduce a homicide from murder to voluntary manslaughter, but threats accompanied by menaces, though the menaces do not amount to an actual assault, may in some instances be enough to excite the fears of a reasonable person so that he or she acts from these fears and not from malice or any spirit of revenge. In all cases the motive is for the determination of the jury.

What circumstances will justify an excitement of passion and exclude all idea of deliberation or malice, the law does not undertake to say. It furnishes a standard and leaves it to the jury in each case to make a comparison and determine whether the special facts of the case before them come up to that standard or not. It is for you to say whether the slayer acted from passion or revenge, if either.

An even lesser degree of homicide is that of involuntary manslaughter. A person commits involuntary manslaughter when, in the commission of an unlawful act other than a felony, she causes the death of another human being without any intention to do so. In this connection if you find that the defendant made a nonfelonious assault upon the victim in that such assault was made neither with a deadly weapon nor with an intent to murder and that the

victim died as a result of such assault, then the defendant would be guilty of involuntary manslaughter.

A nonfelonious assault is further described as one in which an attempt is made to commit a violent injury to another or the commission of an act which places another person in reasonable apprehension of receiving a violent injury, but such assault does not involve the use of a deadly weapon.

On the other hand, if you find that the defendant was engaged in a felonious assault upon the victim, then involuntary manslaughter would not be applicable.

A felonious or aggravated assault is one which involves the use of a deadly weapon or an intent to murder.

Where a person dies because the defendant was acting in reasonable defense of herself, then the homicide is justifiable. Self-defense is a law of necessity. Every person has a right to defend herself against death or serious bodily injury.

A person is justified in threatening or using force against another when and to the extent that she reasonably believes that such threat or force is necessary to defend herself against such other's imminent use of unlawful force. However, a person is justified in using force which is intended or likely to cause death or great bodily harm only if she reasonably believes that such force is necessary to prevent death or great bodily harm to herself or to prevent the commission of a forcible felony.

A forcible felony is one which involves the use or threat of physical force or violence against any person.

Reasonable belief means that the defendant, acting as a reasonable person, believed the described facts existed.

In deciding this question you may take into account the respective physical size and abilities of the parties involved, if such is shown by the evidence.

A person would not be justified in using such force as I have just described if she provokes an attack against herself as an excuse to inflict bodily harm upon the other person, or if she were the aggressor in the first instance.

In deciding whether the theory of justification is applicable to the otherwise unlawful act, the fundamental question is whether the act was done only as a measure of prevention against an impending or progressing wrong or whether it was motivated by revenge or other illegal purpose originating with the defendant.

Members of the jury, you should take the law that I have given you in these instructions and apply it to the facts of the case as you find them to be and arrive at a verdict which speaks the truth. The object of all legal investigations is the discovery of the truth.

If you find beyond a reasonable doubt that the defendant committed the offense of murder as charged, then you would convict her, and the form of your verdict would be, "We find the defendant guilty as charged," or, "We find her guilty of murder."

If you decide she is not guilty of murder or entertain a reasonable doubt as to her guilt of that offense, you would consider whether she is guilty of the offense of voluntary manslaughter. If you find beyond a reasonable doubt that she is guilty of voluntary manslaughter, you

would convict her, and the form of your verdict would be, "We find the defendant guilty of voluntary manslaughter."

If you do not find the defendant guilty of voluntary manslaughter or entertain a reasonable doubt as to her guilt of that offense, you would consider whether she is guilty of the offense of involuntary manslaughter. If you find that she is guilty of that offense it would be your duty to convict her, and the form of your verdict would be, "We find the defendant guilty of involuntary manslaughter."

If you do not believe she is guilty of involuntary manslaughter or entertain a reasonable doubt as to her guilt of that and the other offenses, then it would be your duty to acquit her, in which event the form of your verdict would be, "We find the defendant not guilty."

Whatever your verdict is, members of the jury, one of you as foreperson should write it out on the back of this indictment. That person should sign it and date it. Notify the bailiff that you have arrived at your verdict and you will be brought back into court so that your verdict can be read and published.

Now, that concludes my instructions to you at this time, and I'm going to ask all of you including at this time the alternate jurors to retire to the jury room, but do not begin your deliberations until such time as one of the bailiffs brings you the indictment and the various pieces of documentary and physical evidence and also asks at that time the alternate jurors to come back out here.

You may retire to the jury room.

* * *

(The jury retired at 3:21 p.m.)

THE COURT: Do you have any objections to the charge, Mr. Pace or Mr. Hardy?

MR. HARDY: No, your Honor.

THE COURT: Do you at this time, Mr. Buice?

MR. BUICE: Your Honor, I would like to bring a couple of things to the Court's attention. One of them is—has to do with defendant's request number 15, and the point I make is that the State must prove unlawfulness, and that is to say, the absence of the necessity for self-defense beyond a reasonable doubt; it was not included in the charge as I understood it, and I believe that that is the law, that if she establishes facts in the course of the defense which indicates that certain steps were taken in self-defense, then the State has the burden of showing the lack of necessity for that self-defense beyond a reasonable doubt.

Supreme Court, U.S.
FILED
AUG 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-67

In The

Supreme Court of the United States

October Term, 1987

—o—

ELTON FLOYD JAMES, SUPERINTENDENT,

Petitioner,

v.

JO NELL WISECUP,

Respondent.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

BRIEF IN OPPOSITION FOR THE RESPONDENT

—o—

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QUESTIONS PRESENTED

1. Whether the Circuit Court correctly concluded that the trial court's instructions during the guilt-innocence phase of Respondent's trial were unconstitutionally burden-shifting.

2. Whether the Circuit Court correctly concluded that the burden-shifting instruction was not harmless.

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No. 87-67

In The

Supreme Court of the United States

October Term, 1987

ELTON FLOYD JAMES, SUPERINTENDENT,

Petitioner,

v.

JO NELL WISECUP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

STATEMENT IN OPPOSITION TO JURISDICTION

The Petition for Writ of Certiorari was not filed within sixty (60) days of the denial of Petitioner's Motion for

Rehearing to the Eleventh Circuit Court of Appeals on April 23, 1987. Petitioner has failed to timely file his Petition pursuant to Rule 20 of the Supreme Court Rules, and failed to move the Court for an extension of time within which to file. Respondent respectfully requests that the Petition be dismissed for failure to comply with the Supreme Court Rules.

———o———

STATEMENT OF THE CASE

Respondent does not dispute the procedural history of the case as provided by the Petitioner.

Respondent submits the following facts to further inform the Court of the background of this case.

This case involves the death of Danny Wisecup, who was shot and killed during the course of an argument and struggle with his wife, Respondent Jo Nell Wisecup, in their home on November 2, 1979.

Danny and Jo Nell Wisecup had been married for a little over two years and, although Danny and Jo Nell lived together, socialized together and loved each other, they had numerous arguments. (T. 281-85, 229-30).

Testimony of those close to the Wisecup's reflected the fact that Danny sometimes had a violent temper and that when the couple argued, Jo Nell would oftentimes go to her parents' house until things settled down. (T. 230, 231, 284-88).

Jo Nell Wisecup testified that her husband had beaten her in front of other people, had choked her, hit her in the face and kicked her while she was on the floor. (T. 284-88).

Danny Wisecup died on November 2, 1979. Most of the events that led up to his death are not in dispute and are accurately reflected in the three statements given by Ms. Wisecup to the police as well as in the testimony of witnesses with no interest in the outcome of the case.

Shortly before 5:00 p.m. on November 2, 1979, Jo Nell Wisecup was at work at the office of Dr. Max Novack, a dentist in Warner Robins, Georgia, where she had been employed for almost five years. Ms. Wisecup was the dental assistant and receptionist. Danny Wisecup came into the doctor's office in a mad rage. He asked Jo Nell if she had taken money out of the credit union. She said she had and that the money was for Christmas. Danny Wisecup was mad because he wanted to use the money to pay for drugs. (T. 303-04). This conversation was witnessed by Mary Beth Enfinger, who was called to testify by the State. She testified that Ms. Wisecup was in a normal mood until Danny came in, and that Danny was the one who was mad when he came in. She specifically testified that Danny was mad and that he said, "I owe that guy some money for those drugs, and now, I don't have the money to pay him." (T. 198).

Both Ms. Wisecup and witness Enfinger testified that the argument started by Danny Wisecup continued for several minutes. (T. 198, 304-05).

Ms. Wisecup testified that she told her husband that she was going to go home, pick up her two and a half year old son at the baby sitter's across the street, and that she was going to go off for awhile, as she frequently did when they argued. (T. 288, 305). Ms. Wisecup testified that Danny told her that she "wasn't going." (T. 305).

This statement was corroborated by Mitchell Manning, an employee at the Greyhound Bus Station across the street from Dr. Novack's office. Mr. Manning testified that he saw Danny Wisecup leaving Dr. Novack's office and that he made the remark, "You're not going no damn where." (T. 218).

Danny Wisecup got home first. Jo Nell Wisecup arrived home second and parked her car. Ms. Wisecup testified that she left her purse and keys in her car and started walking across the street towards the Humphries house, where her child was being kept. Danny Wisecup came out of the house, took Jo Nell's keys out of her car. and went back into the house. Jo Nell saw this happen, turned around and went back towards her house. (T. 307). This sequence of events was confirmed by Velma Carroll, a neighbor, who saw Ms. Wisecup start out towards the Humphries house and then turn back as if called by someone.

Ms. Wisecup testified that she went through the garage and into the house through the back door. Danny was on the phone talking to Jo Nell's mother. He slammed down the phone and headed for the living room. (T. 308). This was corroborated by the trial testimony of Ms. Wisecup's mother and father. (T. 232, 255).

Ms. Wisecup testified that she told Danny that she wanted her car keys and that they argued about the keys. (T. 308-09). She described him as "furious." She stated that she was intent on leaving and that she would even have walked to get away from the house. As she started to go towards the door, Danny ran by her and went up the stairs. He came running back down the stairs and yelled,

"You're not going any god damn place. . . . If you go out that door, I'll shoot you." He had the gun. (T. 310).

Ms. Wisecup testified as follows. "I knew he meant it. He had never pulled that thing on me before." (T. 310).

Ms. Wisecup testified that she told him to put the gun down and that she was going to go ahead and go out the door. He ran up and grabbed her arm. He started slapping her. (T. 311).

Ms. Wisecup described the events that followed:

> I know I could feel his hand. I know I could feel his hand on the gun. I know I could feel, it was like both of our hands were together, because I wanted him to put it down, move it away before he hurt me, but he was slapping me, and he, I don't know. . . . I remember him, we were just struggling over that gun, and it was like the resistance broke loose, and I leaned one way and he leaned the other, and there was a pop, and that's when he reached up and grabbed his chest and said, 'Jo' (crying), and I caught him in my arms and sat down, and I told him to lay down, and he went to sit back up, and he was moaning, and all of a sudden blood started coming from his nose, and I reached up and grabbed the telephone, and I couldn't dial the number. I called the operator and told her to get them, and I repeated over and over again, it must have been twelve times, what my address was, they couldn't understand me, and they told me an ambulance would be there, and I hanged the phone up, and he started moving all over that floor. And all that blood started coming from his mouth and his nose, and I reached up there and grabbed those towels out of the drawer (crying), and he was bleeding so much, he was bleeding in my arms, and there was nothing I could do. I didn't know anything else to do for him. I kept, I reached up there and got more towels, and I grabbed the telephone again, and I got them back on the telephone,

> and I said, 'God, tell me what to do, he's bleeding to death, I know they should have been here by now.' They, I said—they said, just keep applying pressure and they'll be there soon, and I checked him and I couldn't get any pulse, I couldn't get anything out of him; and that's when Detective Maye walked in. I was still talking to the ambulance service. They just told me to keep applying pressure, and I didn't ever see him move again. I didn't know whether he was dead or not (crying). (T. 312-313).

Detective Maye described Ms. Wisecup as "crying and rather hysterical" (T. 33) when he arrived. The terms crying, hysterical, upset and trembling were used to describe Ms. Wisecup by all of the witnesses who saw her. (T. 33, 82, 122).

Detective Maye took a statement from Ms. Wisecup moments after he arrived at the house. Her statement was entirely consistent with her trial testimony except that she did not mention drugs in the first statement. (T. 9, *et seq.*). She also made a statement to police approximately five days later which was the same, and Danny's need for drug money was mentioned at that time.

Ms. Wisecup was charged with murder. At her trial, the Judge gave a jury instruction nearly identical to that found improper in *Francis v. Franklin,* 471 U.S. 307, 105 S.Ct. 1965 (1985), shifting the burden to Ms. Wisecup on the question of intent. (T. 351).

The Court below found that this instruction improperly shifted the burden on the issue of intent to Ms. Wisecup and that such error was not harmless under the facts of this case.

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REASONS FOR NOT GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT THE TRIAL COURT'S JURY INSTRUCTIONS DURING THE GUILT-INNOCENCE PHASE OF RESPONDENT'S TRIAL WERE UNCONSTITUTIONALLY BURDEN-SHIFTING.

The circuit and district courts found that the following jury instruction was "virtually identical" to the jury instruction found unconstitutionally burden shifting in *Francis v. Franklin,* 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed. 2d 344 (1985):

> Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the product of that person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. These presumptions may be rebutted by any evidence to the contrary. (T. 351).

Comparing this charge to the one given in *Francis v. Franklin, supra,* 105 S.Ct. at 1969, shows that they are identical except for the word "any" in the last sentence.

The use of the word "any" in no way changes the burden shifting nature of the instruction and cannot be viewed as cleansing the unconstitutional nature of the instruction.

This Court's opinion in *Francis v. Franklin, supra,* is absolutely clear that it is the presumption that makes the instruction unconstitutional and that the quality of the evidence necessary to rebut the presumption plays no role in this evaluation.

The State made a similar argument to the Court in *Francis v. Franklin,* to the effect that the rebuttable na-

ture of the presumption rendered it constitutional. This was rejected:

> A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional.
>
> 105 S.Ct. at 1973.

The State also argues that other instructions contained in the charge would have prohibited a reasonable juror from viewing these presumptions as mandatory. Again, the Respondent refers to *Francis v. Franklin, supra,* and suggests that the circuit court was correct in rejecting this proposition.

This Court specifically held in *Francis v. Franklin, supra,* that other instructions that merely contradict the constitutionally infirm instruction "will not suffice to absolve the infirmity." 105 S.Ct. at 1975. The unconstitutional instruction would have to be *explained* in a way that absolves the unconstitutionality:

> The Court today holds that contradictory instructions as to intent—one of which imparts to the jury an unconstitutional understanding of the allocation of burden of persuasion—create a reasonable likelihood that a juror understood the instruction in an unconstitutional manner unless other language in the charge *explains* the infirm language sufficiently to eliminate this possibility.
>
> 105 S.Ct. at n. 8, p. 1976.

The portions of the charge cited by the State, regarding presumption of innocence, reasonable doubt, accident, and so forth, sometimes reflect contradictory instructions, but none of these instructions explains the mandatory presumption given by the Judge. In fact, many of these in-

structions, such as "no person will be presumed to act with criminal intentions . . ." (T. 350 and Appellant's Brief, p. 12) are also virtually identical to language in *Francis v. Franklin, supra,* at 1970 ("A person will not be presumed to act with criminal intention but the trier of fact . . .").

As was noted in *Francis v. Franklin, supra,* at 1974, the jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied. The same is true here, and this is a case where intent was *the* issue to be resolved by the jury.

Based upon the foregoing, Respondent respectfully suggests that the lower courts were correct in finding that the jury instruction given in this case was constitutionally infirm.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY FOUND THAT THE BURDEN-SHIFTING INSTRUCTION WAS NOT HARMLESS.

The Petitioner's assertion that the Respondent's defense was "physically impossible," "wholly implausible," and "frivolous" is, itself, a misrepresentation of the evidence and record in this case. In the first instance, the circuit court and district court considered whether the jury instruction error was harmless and concluded that, "although there is certainly sufficient evidence of intent to sustain a conviction of guilt, the evidence is not overwhelming . . ." (RI-12-5).

This is not a case where the defense was both "frivolous and a physical impossibility" as claimed by the State. In fact, the State has pushed this theory through the dis-

trict and circuit courts, and both courts have rejected the argument.

The State claims that ". . . ballistics experts testified that if there had been such a struggle the path of the bullet through the body of the victim would have been 'at an angle' rather than the straight path through the victim's body that was present in this case." (Petition, p. 15). In fact, Larry Howard of the Georgia State Crime Lab testified that Danny Wisecup was shot in the chest at a "downward angle." (T. 181). Danny Wisecup was six feet, one inch (6′1″) tall, and Jo Nell Wisecup is five feet, seven inches (5′7″). (T. 297). The entry wound in the chest, going slightly downward, and the level trail of the bullet at four point three feet (4.3′) from the floor is highly consistent with the struggling, falling couple.

The State asserts that there is significance in the fact that there was no powder residue on the hands of Danny Wisecup. (Petition, p. 15). However, Richard Ernest of the State Crime Lab testified that powder nitrate dissipates on its own in nine to 12 hours. It is uncontradicted that Danny Wisecup died at approximately 5:00 p.m. on November 2, 1979, and that his hands were not swabbed until 3:30 the following day. (T. 105).

The State claims that, "The ballistics expert testified that the pistol was fired from a distance of no less than two to five feet from the victim's entry wound." (Petition, p. 15). The fact is that Larry Howard of the State Crime Lab testified that he could not swear with any degree of certainty that the gun was any more than six inches (6″) away from Mr. Wisecup. (T. 188).

Thus, the State's own evidence and witnesses not only fail to contradict Ms. Wisecup's version of the facts, they are consistent with and tend to support her position.

The circuit and district courts properly concluded that intent was not conclusively shown, and it is clear that the lower courts properly applied the harmless error rule.

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CONCLUSION

For all of the above and foregoing reasons, Respondent prays that the Petition for Writ of Certiorari filed on behalf of Elton Floyd James be denied.

DATED: This 12th day of August, 1987.

Respectfully submitted,

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